The Tennessee Advisory Commission on Intergovernmental Relations

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MEMORANDUM

TO: TACIR Commission Members

FROM: Harry A. Green
Executive Director

DATE: June 12, 2008

SUBJECT: Summary Report: PC 1101 Working Group

During the summer of 2007, I appointed a working group to study details of the implementation of Public Chapter 1101 in order to determine whether the intent and goals of the general assembly that adopted the legislation had been fulfilled. Additionally, the group was charged with the responsibility of identifying those parts of the act that needed strengthening, clarifying or otherwise amended based upon the experiences of those entities that raised questions about the act. The draft report is still a work in progress. This is a summary of the report thus far.

The members of the working group represent five agencies and include one member of the private sector:

Ken Belliveau	TACIR
Daniel Carter	Landowner/researcher
Sam Edwards	Greater Nashville Regional Council
Dan Hawk	TN Department of Economic & Community Development
Tim Roach	TN Local Planning Office
Jeanne Stevens	TN Department of Transportation
Bill Terry	TACIR

It has been ten years since the passage of Public Chapter 1101 (Acts of 1998), and seven years since the July 1, 2001, deadline for local governments to have their growth plans approved. The statute established a general framework within which local governments in each county could work cooperatively in developing 20-year growth

plans to guide growth and development patterns over that period. This initial phase of implementation of the statute can be characterized as highly successful. All counties and the cities therein required to have a growth plan in place now have one. TACIR has documented the stages of implementation on a regular basis in previous reports. Since those initial approvals, sixteen counties have amended their growth plans.

During the first five to six years after passage of the act, most emphasis among all governments was to comply with the requirements to have an approved growth plan and create a Joint Economic and Community Development Board (JECDB). There was also general agreement among interested parties that no amendments should be considered until the process had "enough time to work." However, beginning in 2004, amendments to the statute began to be introduced. In 2004, six bills amending various sections of PC 1101 were referred to TACIR for study. In 2005, there were six more, in 2006 there were five, and in 2007 there were three. In 2008, a bill was filed and passed that deleted those parts of the act that no longer applied, and one bill was filed that changed the process for amendment, but it was deferred for summer study thus stopping any action on the bill.

Purpose of PC 1101

The purposes of the Act are spelled out in Tennessee Code Annotated § 6-58-102. It states that the general assembly intends to establish a comprehensive growth policy that

(1) eliminates annexation or incorporation out of fear,

(2) establishes incentives to annex or incorporate where appropriate,

(3) more closely matches the timing of development and the provision of public services,

(4) stabilizes each county's education funding base and establishes an incentive for each county legislative body to be more interested in education matters, and

(5) minimizes urban sprawl.

The initial conclusions of the report regarding those purposes are summarized below.

Eliminates annexation or incorporation out of fear

The establishment of urban growth boundaries and planned growth areas in counties corrected the problem of protecting territory for future annexation or incorporation. The UGBs protect areas into which cities may expand, and recent amendments to the act provide that no city may annex territory in another city's UGB. The PGAs provide for areas in a county where new incorporations may occur. It would appear, therefore, that this particular goal has been met.

Establishes incentives to annex or incorporate where appropriate

The act does not define the term "appropriate" for purposes of annexation or incorporation, which begs the question: where and when is annexation or incorporation appropriate? From a traditional city perspective, the act contains a disincentive for annexation in the 15-year hold harmless protection given counties from the loss of local option sales taxes and wholesale beer taxes so that the revenues that were collected in the annexed area remain with the county after annexation. The purpose of this provision was to stabilize funding for county school systems. Reductions in funding for recurring school operation and maintenance is prohibited by law unless enrollment declines; when funding is lost through annexation, counties must make those funds up from other local sources.

Similarly, a disincentive to incorporate new municipalities is found in the requirement placed on them by Tennessee Code Annotated § 6-58-112(c) to impose a property tax that would raise revenues not less than the amount of state-shared tax revenues that the new city would receive. Additionally, the county legislative body must approve a new incorporation election. Since many counties view the incorporation of a new city as a negative impact on county government because of the re-direction of sales tax revenues, it is doubtful that a county would approve a new incorporation. It is, therefore, questionable that this goal can be achieved unless the matter is viewed as discouraging annexation and incorporation where it is inappropriate. At the same time, if "appropriate" were interpreted to mean only within the cities' defined UGBs, then the provision allowing annexation into Planned Growth Areas or Rural Areas by referendum would seem contrary to this goal.

More closely matches the timing of development and the provision of public services

Matching the timing of development to the provision of public services requires both appropriate plans and an implementation process. However, the act has been interpreted to require approval by the Local Government Planning Advisory Commission (LGPAC) of the growth plan if all governmental entities in a county simply agree to a set of lines on a map. (See further discussion of this issue below.) A growth plan map without the necessary planning elements, the elements embodied in Tennessee Code Annotated § 6-58-106, and a mechanism for following through on them cannot achieve this goal. It is dependent on capital budgeting decisions that can be outside the planning process.

The plan of services requirement of PC 1101 (Tennessee Code Annotated § 6-51-102) created a mechanism to ensure that public services are provided to a newly annexed area within a reasonable time, but development may occur outside the city limits, even outside a city's UGB, and the plan of services would not be required. The resulting conclusion is that any growth plan that consists only of a map or a growth plan that does not provide any plan for services, in the absence of coordination between planning and capital budgeting decisions both in- and outside the UGB, fails to meet this goal of the act.

Stabilizes each county's education funding base and establishes an incentive for each county legislative body to be more interested in education matters

Prior to the passage of PC 1101, in some cases municipalities would annex territory solely to obtain the local option sales taxes being generated in an unincorporated area near the city. When an annexation such as this occurred, it reduced the amount of sales tax going to the county, taxes used mainly to fund the county school system. Consequently, these annexations created friction between city and county and difficulty for the county in adequately funding its schools.

Passage of PC 1101 changed this situation. The act includes a hold harmless provision for counties that such local option sales tax and wholesale beer tax revenues remain with the county for 15 years after annexation. Any increase in those revenues after annexation goes to the annexing municipality, as would any revenues from new businesses established after annexation. This provision may have eliminated the possibility that revenue-producing businesses would be annexed solely for the purpose of the revenue. There are, of course, many other valid reasons for municipalities to annex territory, and many such annexations have occurred since 1998.

If one assumes that protecting these funds for the county school system after annexation would reduce revenue losses as a result of annexation, it would appear that the act has contributed to the stabilization of county education funding, at least to the degree that municipal annexation of a revenue producing property could affect such funding.

Minimizes urban sprawl

This goal may be hardest to achieve. Much depends on how large growth boundaries and planned growth areas are and how much actual planning went into establishing them. It should be immediately acknowledged that the mere fact that growth boundaries have been established and an approved growth plan put in place cannot ensure that sprawl will be reduced and a compact form of development within a city and its urban growth boundary will occur. Each municipality must look inward and develop a plan, policies and the necessary infrastructure to create that compact form. Without such plans and policies, status quo suburban sprawl will continue to dominate the urban form even within the urban growth boundary.

Many growth plans that have been approved by the LGPAC consist of only a map to which all governmental entities in a county agreed. Even entities that based the map on the planning requirements spelled out in Tennessee Code Annotated § 6-58-106, with few exceptions, did not contain any kind of a plan for future development. Even though these plans were approved by LGPAC as required in Tennessee Code Annotated § 6-58-104, they may not meet the intent of the act and consequently may fail to minimize urban sprawl. It should also be recognized that the required approval by LGPAC simply when all governmental entities agree on a map creates a roadblock to effective planning because it is all too easy just to agree on a map without any real planning for the future.

Two factors in particular may have a significant impact on sprawl outside of any planning for growth by local governments: reliable water sources and reasonably priced oil. Many new developments are occurring in areas that do not have a reliable and adequate source of water, both for consumption and for fire protection. Several cities and counties across the country with high growth rates either have not addressed their actual source of water supply or are simply outgrowing their capacity to provide water services.

The price of oil has recently reached levels that have never been discussed or projected. The urban and suburban development patterns that have been built in this country are based on the assumption that oil will continue to be plentiful and priced affordable for most people. This assumption is no longer valid. The era of cheap and easily accessible oil appears to be drawing to a close. This can have a major impact on the conduct of the society and on economic system.

The fundamental issue is the need for local governments to completely rethink the land use and transportation practices that have been in place for the last fifty years. This will involve more than just tinkering with zoning ordinances. A very serious effort to examine local building codes, zoning ordinances, subdivision regulations, long-range plans and cooperation among fragmented local government entities, including school systems and public utilities, is required. The principles of compact development, examination of service costs, provisions and planning for future growth and cooperation across jurisdictional lines as espoused in PC 1101 are particularly crucial in designing the community of the future, one that is not based on the assumption of continuing cheap and plentiful oil.

Analysis of Public Chapter 1101

Several sections of the act have been identified in the full report as needing amendment.

Membership of the Coordinating Committee, Tennessee Code Annotated § 6-58-104—The Act created a coordinating committee in each county with the membership specified. There is considerable opinion that the membership is skewed in favor of municipalities where a county contains several municipalities.

Approval of a Growth Plan, Tennessee Code Annotated § 6-58-104(c)(1)—This section of the Act requires that all growth plans recommended or revised by the coordinating committee and ratified by all local governments shall be submitted to and approved by the LGPAC. This statute includes a statement requiring LGPAC to approve the plans of non-charter counties “if [it] determines that such urban growth boundaries, planned growth areas and rural areas conform with the provisions of § 6-58-106. The statute referenced lists all of the factors and analyses required for establishing urban growth boundaries, planned growth areas, and rural areas. Even so, in many cases nothing more than a map showing urban growth boundaries, planned growth areas and rural areas was submitted to LGPAC, and none of the planning elements specified in § 6-58-106 were reported. These plans were approved.

Amending a Growth Plan, Tennessee Code Annotated § 6-58-104(d)(1)—After a growth plan has been in effect for at least three years, this section provides that any city or the county may propose an amendment by filing notice with the county mayor and the mayor of each municipality in the county. It has been suggested that growth plans should be revisited on some kind of regular basis whether or not any locality has proposed an amendment. Particularly in counties with consistently high growth levels, a case for review of the growth plan at intervals of five years can be made.

Regional Planning, Tennessee Code Annotated § 6-58-106(d)—Prior to the adoption of PC 1101, any municipal planning commission that had been designated a regional planning commission for a territory outside of the city limits in an approved planning region had the authority to adopt extraterritorial zoning and subdivision regulation subject to certain requirements. However, this section of PC 1101 states that any municipality may provide extraterritorial zoning and subdivision regulation **only** with the approval of the county legislative body.

This requirement severely limits the ability of a municipality to plan for new development and enforce development regulations within the approved urban growth boundary. The UGB is the area reserved for future growth of the municipality. Without the ability to plan for future growth in the area, a municipality cannot affect the pattern of development there. Consequently, the compact form of a city promoted by PC1101 and the goal of encouraging new growth in the existing city before it occurs in the UGB cannot be realized. The provision of urban services encouraged by Tennessee Code Annotated § 6-58-106(a) is difficult if not impossible without the ability to plan and adopt policies and regulations.

Burden of Proof in an Annexation Challenge, Tennessee Code Annotated § 6-58-111(a)—There has been considerable discussion about the burden of proof in a quo warranto challenge to an annexation, and several bills have been introduced to change the existing language. PC 1101 shifted the burden of proof for showing that an annexation was unreasonable from the city to the party challenging the annexation. It also shifted the trial away from trial by jury to the circuit court or chancellor, which might appear to make it easier for a city to overcome the legal challenge. Substitution of the word “or” for the word “and” between the two elements of reasonableness as the statute had previously stated has created a controversy over whether it is now more difficult for cities to prevail at trial.

The burden has shifted, but is it less for the plaintiffs than it was for cities? Many city officials believe that the change has made it more difficult for a municipality to prevail in a legal challenge to an annexation within the UGBs. However, a close reading of the law before and after suggests that cities are in much the same position as before. Prior to PC 1101, cities had the burden of proving two elements of reasonableness. After PC 1101, those seeking to overturn annexation have the burden, and cities must now disprove two elements of unreasonableness. The main effect appears to be a shift from cities to plaintiffs in who has to meet the preponderance of the evidence (more likely than not) test, which is the standard of proof in these cases as the following table illustrates:

Proof Required to Prevail in Annexation Cases

	Before PC 1101	After PC 1101
City Annexing	Both elements of reasonableness >50% likely	Both elements of unreasonableness 50% unlikely
Party Contesting	Either element of reasonableness 50% unlikely	Either element of unreasonableness >50% likely

As the table shows, both before and after PC 1101, annexation cases involve two elements, and cities have to prevail on both, but the standard that must be met for cities to prevail is actually slightly lower after PC 1101. Because the burden of prevailing has shifted to the parties contesting annexation, they must now convince the court that they are 51% likely to be right on one element. Before PC 1101, they had to be only 50% likely to be right on one element. Viewed from the perspective of a city, before PC 1101, it had to convince a judge or jury that it was more than 51% likely to be right on both elements; now to it has to convince a judge that it is 50% likely to be right on both elements. This issue may well be moot given that there is case law on the subject suggesting that there is little difference between the two elements.

And arguably, given the goals of PC 1101 and the purpose of UGBs, a more appropriate standard would be to require cities only to show that the annexation corresponds to the areas identified in the growth plan as needed for expansion, and that a plan of services is part of the annexation ordinance. The test should be a showing that no land is available for development without annexation. And there should be a plan for annexation, a schedule showing the areas that could and should be annexed in specified phases as growth occurs.

Joint Economic and Community Development Boards, Tennessee Code Annotated § 6-58-114—This section creates a Joint Economic and Community Development Board (JECDB) in each county. It was the intent of the Act and it is so stated ". . . that local governments engage in long-term planning, and that such planning be accomplished through regular communication and cooperation among local governments . . . ." The vehicle established for the communication and cooperation was the JECDB. However, the board is not given any responsibilities other than to foster communication relative to economic and community development. Because the boards have no power to engage in long-term planning, the boards could only encourage the participating cities and the county to engage in such planning. Perhaps there are other functions that a JECDB could fulfill.

Relationship to Title 13 Planning, Tennessee Code Annotated § 13-3-101 through § 13-7-410—PC 1101 provided for growth boundaries and required certain studies and reports prior to the development of those boundaries as specified in Tennessee Code Annotated § 6-58-106. However, there is no provision in the Act to connect the

requirements contained therein with the comprehensive planning legislation of Title 13, which contains all statutory authority for cities and counties to engage in planning activity and adopt subdivision and zoning regulations. In reality, the planning requirements of PC 1101 are similar activities in which a city or county might engage in carrying out long-range planning under Title 13, but they are not directly related. Of course in the process of preparing a growth plan, any city or county could have prepared a related general plan and incorporated it into the growth plan. But most didn't, and many growth plans consist of only a map, as noted in discussions above.

Development in Designated Rural Areas, Tennessee Code Annotated § 6-58-106(c)(1)(C)—A number of jurisdictions have asked what type of development is appropriate in a growth plan's designated Rural Areas. This section states "each rural area shall . . . identify territory that, over the next twenty (20) years, is to be preserved as agricultural lands, forests, recreational areas, wildlife management areas or **uses other than high density commercial, industrial or residential development** . . . ." (Emphasis added.) The problem is that there is no definition of "high density" development. The apparent intent of the legislature was to leave this issue and other such definitions to the discretion of local governments.

The fact that planning and land use regulation in Tennessee is optional means that many jurisdictions have none. Therefore, any kind of development can occur in any designated Rural Area in counties and cities without land use regulations, thus avoiding any definition of what is high or low density. Other jurisdictions that have adopted regulations may consider low density to be whatever the local government decides. For example, one county may define low density as one dwelling unit per acre or more, while another may define low density as one dwelling unit per 15,000 square feet of lot area. Perhaps the act should provide more definition regarding the types of development allowed in Rural Areas and some guidelines to address low versus high-density development. The actual definitions, however, should be left to planning officials because of the diverse local circumstances and needs across the state.